

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





5-2-77  
ORIGINAL

77-7095

**United States Court of Appeals  
For the Second Circuit**

RICHARD D. FRIEDMAN, individually and on behalf of the class comprising all persons who are owners of, or are licensed to operate an automobile in the State of New York and City of New York, and on behalf of the class comprising all persons who have received parking tickets and paid fines thereon under the circumstances described herein for the period July 1, 1970 to date hereof, within the City of New York,

*Plaintiffs-Appellants,*

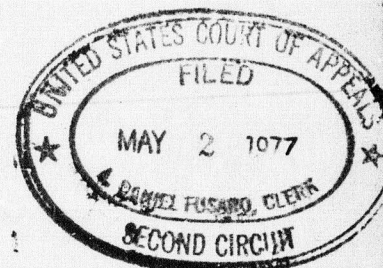
NICHOLAS A. ARENA, FRAN LEÉ, and HAROLD C. HARRISON,

*Intervening plaintiffs,*

*- against -*

ABRAHAM D. BEAME, Mayor of the City of New York, HARRISON J. GOLDIN, Comptroller of the City of New York, ALEXANDER J. MAUTNER, Transportation Administrator of the City of New York, THEODORE KARAGHEUZOFF, Commissioner of Traffic of the City of New York and HARRY VICCOLA, Director of the Parking Violations Bureau of the City of New York, individually and in their respective capacities,

*Defendants-Respondents.*



APPELLANTS' BRIEF

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UNITED STATES COURT OF APPEALS  
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x-----x

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NICHOLAS A. ARENA, FRAN LEE, and HAROLD C.  
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capacities,

Defendants-Respondents.

x-----x

PLAINTIFFS-APPELLANTS' BRIEF

Preliminary Statement

This is an appeal from the judgment of the Honorable JACK B.  
WEINSTEIN, rendered in the U.S. District Court for the Eastern District of  
New York, on the 21st day of January, 1977, in favor of Defendants-Appellees,  
dismissing the Plaintiffs-Appellants' action seeking declaratory, injunctive,  
legal and equitable relief. The Plaintiffs-Appellants' action is brought to  
redress the illegal and unconstitutional creation of "authorized" parking

areas by the City and State of New York, resulting in a special privileged class of persons, that class being the recipients of the aforementioned parking privileges.



STATEMENT OF ISSUES PRESENTED  
FOR REVIEW

The major issue presented for review in the case at bar is whether there is a political problem doctrine which would render it non-justiciable, and/or whether the political question doctrine renders this case non-justiciable.

Other sub-issues stemming from and related to this major issue are:

a. Whether Plaintiffs-Appellants have been deprived of equal Protection and Substantive Due Process as a result of Defendants-Appellees actions;

b. Whether Defendants-Appellees have violated the Due Process Clause of the U.S. Constitution;

c. Whether there has been an improper delegation of powers by the State and City of New York; and

d. Whether the abstention doctrine is applicable to the case at bar.

STATEMENT OF THE COURSE OF  
PROCEEDINGS AND DISPOSITION IN  
THE COURT BELOW

Plaintiffs-Appellants brought their cause of action seeking declaratory, injunctive, legal and equitable relief before the U.S. District Court for the Eastern District of New York.

A hearing was held on January 17, 1977, before the Honorable JACK B. WEINSTEIN, District Judge, upon the Plaintiffs' motion for certification of the cause as a class action; upon the motions of HAROLD C. HARRISON, FRAN LEE, and NICHOLAS A. ARENA for leave to intervene as parties Plaintiff; and upon the Defendants' motion to dismiss the cause of action because the complaint failed to state a claim upon which relief could be granted.

On January 21, 1977, the Honorable JACK B. WEINSTEIN signed an Order granting Plaintiffs motion to have the cause certified a class action; granting leave to HAROLD C. HARRISON, FRAN LEE, and NICHOLAS A. ARENA to intervene in the cause of action, thereby making them parties Plaintiff to the case; and granting Defendants motion to dismiss on the grounds that the questions presented in this case were political in nature and for this reason, should not be decided by that Court.

It is from this Order of Dismissal that Plaintiffs-Appellants now appeal.



### STATEMENT OF FACTS

This is an action brought to redress the deprivation of rights, privileges and immunities secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, and by the Civil Rights Act, Section 1983 (42 U.S.C.A. Section 1983).

The Defendants-Appellees have deprived Appellants of these rights by, 1) permitting state and city agency personnel (and specified others) to park their privately owned vehicles in designated areas of certain city streets while prohibiting the general public from parking in these areas, and by, 2) unlawfully delegating power with respect to regulating parking without initiating and establishing any standard to control the exercise of such power.

The action, brought by Appellants in the District Court (E.D.N.Y.) before the Honorable Jack B. Weinstein, resulted in the case being summarily dismissed, the Court stating:

"There are undoubtedly instances where city employers and other special groups abuse special parking privileges for their own convenience, rather than for emergency services to the public. These abuses raise political problems not warranting a declaration of unconstitutionality of the applicable statutes and administrative system for regulating parking in the city."

The decision was based in large part upon the affidavit of Theodore Karagheuzoff (in support of Defendant-Appellees Memorandum of Law), without ever giving Appellants a chance to be heard on the facts.

It is submitted that the case should not have been cursorily dismissed by labeling the issues "political problems", and that a hearing

should have been held to determine critical issues of fact rather than deciding the case by taking the word of Defendants-Appellees, without giving Appellants their day in Court.



POINT I

THERE IS NO DOCTRINE OF "POLITICAL PROBLEM"  
WHICH WOULD RENDER THE CASE AT BAR  
NON-JUSTICIABLE, NOR DOES THE  
"POLITICAL QUESTION" DOCTRINE RENDER  
THIS CASE NON-JUSTICIABLE.

In granting the Defendants' motion to dismiss, the Eastern District Court stated that the case presented "political problems not warranting a declaration of unconstitutionality. . ." (Appendix at pg. 1) Docket Sheet, Eastern District Court, Entry 1/17/77-Weinstein, J.).

If the Court used the term "political problem" so as to differentiate it from the term "political question", then, clearly the case should have been decided on its factual and legal merits, and not cursorily dismissed. There is no doctrine of "political problem" which would render the case at bar non-justiciable. Indeed, where, as is the case here, allegations have been made concerning infringement upon basic constitutional guarantees, there is every reason for the Court to hear the issues involved in order to safeguard what are among the most precious rights we have.

In a leading case dealing with the political question doctrine, the U.S. Supreme Court stated:

"The doctrine of which we treat is one of "political questions", not one of "political cases". The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. . ." Baker v. Carr, 369 U.S. 186, 217; 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962).

Alternatively, if the Court used the term "political problem" so as to be synonymous with the term "political question", the Court still

should have heard the case at bar.

Friedman v. Beame, does not present a political question which would render it non-justiciable. In the Baker case, the Court set forth six categories in which a "political question" is presented. With reference to these, the Court stated:

"Unless one of these formulations is inextricable from the case at bar, there can be no dismissal on the ground of a political question's presence." Baker, supra., at 217. (Emphasis added)

The six categories set forth in the Baker case as presenting political questions are:<sup>1</sup>

". . .1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or 2) a lack of judicially discoverable and manageable standards for resolving it; or 3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or 4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or 5) an unusual need for unquestioning adherence to a political decision already made; or 6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker, supra. at 217; Sanders v. McClellan, 463 F.2d 894, 897n (1972).

The issues in Friedman v. Beame, do not fall within any of these categories. The first and fourth categories deal with the question of separation of powers. The first refers to commitment to a coordinate political department and the fourth refers to respect due coordinate branches of government. The key word in both categories is "coordinate". It is the relationship between the judiciary and the coordinate branches

<sup>1</sup> numbers added.



of the Federal Government, and not the Federal Judiciary's relationship to the states, which give rise to the "political question". Baker, supra.; White v. Snear, 313 F. Supp. 1100 (E.D. Pa. 1970). "Measuring the consistency of state activity against the command of the federal constitution does not raise the spectre of the separation of powers." Robinson v. Cahill, 351 A.2d 713 (S.Ct. N.J. 1975).

Furthermore, as the Court in Baker stated:

"Deciding whether a matter has in any measure been committed by the constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the constitution." Baker, supra., at 211.

The same responsibility belongs to the Court in the case at bar where such issues are present.

There is, in the case at bar, no need for unquestioning adherence to a political decision already made, as the fifth category in Baker refers to. Indeed, in the present case, even were this a political question scrutinization would be warranted. It is difficult to support the contention that authorized parking areas are necessary for employees who are required to travel during the day, when such parking areas are, in fact, used by persons who work in the same building all day. There are also environmental considerations (discussed more fully in Point II of this Brief) to be taken into account. For now, it is sufficient to ask ourselves why we should encourage more use of automobiles in a city already engulfed by exhaust fumes?

The second, third and sixth categories set forth by the U.S.

Supreme Court in Baker also present no bar whatsoever to the determination by the Court of Friedman v. Beame on its merits. The case is representative of a classic constitutional (or federal) question -- that of deprivation of equal protection and due process (See Point II of this Brief for a full discussion of this subject matter). The judicial standards upon which a claim is based on the equal protection clause are well developed and familiar. . .

"and it has been open to courts since the enactment of the Fourteenth Amendment to determine. . .that a discrimination reflects no policy but, simply arbitrary and capricious action." Baker, supra., at 226; Buchanan v. Rhodes, 249 F.Supp. 860 (N.D. Ohio, 1966).

There is no policy determination presented here, which is inappropriate for judicial discretion. Nor is there potential embarrassment from various departments making pronouncements on one question (as the sixth category in Baker refers to). One of the main issues in controversy in the case at bar is one traditionally resolved by the Courts. In fact, the Court in Buchanan stated:

". . .As much as we abhor the judicial pursuit of questions essentially political in nature, we cannot abdicate our judicial duty to redress grievances arising from violations of federal constitutional rights. Therefore, if the Plaintiffs have accurately framed a cause of action based upon the Equal Protection Clause they are entitled to go forward." Buchanan, supra., at 864.

Furthermore, "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." Baker, supra., at 209.



"...if discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." Snowden v. Hughes, 321 U.S. 1, 11, 64, D.Ct., 397, 402, 88 L.Ed. 497.

One of the basic issues in controversy in the Friedman v. Beame case, as was stated earlier, is the denial of equal protection in violation of the Fourteenth Amendment of the Constitution of the United States. (Point II of this Brief discusses this subject-matter fully.) In short, Plaintiffs-Appellants claim is that the disputed parking regulations are in derogation of the equal protection clause as written and as applied.

Another major issue presented in the case at bar relates to "Delegation of Powers" (Discussed fully in Point III of this Brief). We are, of course, aware that there exists a separation of powers between the coordinate branches of government in New York State.

In cannot be said that questions relating to whether or not the quality or the extent to which delegations made by the legislature are proper, are "political questions". Even if, for the sake of argument, we say they are, however, this does not render them non-justiciable, for the Courts have traditionally scrutinized and reviewed such questions as these. See for example, City of Utica v. Water Pollution Control Board, 4 N.Y. 2d 164, 182 N.Y.S. 2d 584; Packer Collegiate Institute v. University of the State of New York, 298 N.Y. 184, 81 N.E. 2d 80.

Furthermore, the Court below was not in a position, without a hearing, to determine issues of fact relating to whether or not proper standards were set up in this case by those delegated to do so. The Court

decided critical issues of fact by merely accepting the word of Defendants-Appellees, without ever giving the Plaintiffs-Appellants their day in court. We respectfully submit that the Court was not in a position to do this, and that by doing so, it committed reversible error.



POINT II

DEFENDANTS-APPELLEES ACTIONS HAVE DEPRIVED  
PLAINTIFFS-APPELLANTS OF EQUAL PROTECTION  
AND SUBSTANTIVE DUE PROCESS

This action is brought under 42 U.S.C. §1983, which provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Since the federal cause of action created by the section does not, by itself, confer jurisdiction upon the Federal District Courts to adjudicate these claims, Plaintiffs-Appellants rely principally upon 28 U.S.C. §1343 (3):

"The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any persons:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . ."

It is submitted that the right, privilege or immunity that Appellants have been deprived of by the Defendants-Appellees in this action are the right to due process of law under the Fourteenth Amendment of the Constitution and the right to equal protection of the laws under the Fourteenth Amendment of the Constitution.

While there are many cases where due process is an issue and equal protection is not (and vice versa), there are many situations where both may be applicable and overlap. (This is especially common when substantive -- as opposed to procedural -- due process is involved. Procedural due process is also an issue here, since it is contended by Appellants that those rights were violated, as well; however, that subject is discussed under Point III of this Brief.) Many of the issues relevant to equal protection, therefore, are also relevant to due process, and vice versa, and for these reasons, they are discussed together in this section of Appellants' Brief.

In Railway Express Agency, Inc., et al. v. New York, 337 U.S. 106 (1949), a U.S. Supreme Court case involving the constitutionality of a New York City traffic regulation, Justice Jackson discussed the significance of the equal protection clause:

"...cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object or regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." 336 U.S. at 112.



In addition:

"The due process clause of the Fourteenth Amendment conditions the exertion of regulatory power by requiring that the end shall be accomplished by methods consistent with due process, that the regulation shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Nebia v. New York 291 U.S. 502, 525 (1934)

And these principles have been specifically held to apply to parking regulations, People v. Lang, 106 N.Y.S. 2d 829 (Nassau County Court), undoubtedly because:

"The fundamental idea of a public street or highway is that it is public for all purposes." People v. Koenig, 187 N.Y.S. 2d 379, 380 (1959).

Therefore, a parking regulation of a municipality, in order to be reasonable, must operate with substantial equality and uniformity. People v. Greeman, 137 N.Y.S. 2d 388 (Westchester County Court 1952); Farrell v. City of Syracuse, 137 Misc. 472, 242 N.Y.S. 316 (Supreme Court Onondaga County 1930). Greeman held that a village parking regulation providing, in substance, that parking on a certain street was strictly restricted to residents living on the particular street, was discriminatory and void because it bore no relation to the welfare of the public generally but was designed for the convenience and interest of a special class.

So fundamental is this principle that in People v. Koenig, supra., the court said that a parking prohibition in front of a driveway which exempted the owner of the property containing the driveway for whose protection the regulation exists, would be ruled "discriminatory and designed for the interest of a special class and would accordingly be void."

(People v. Koenig, supra., at 380).

The regulations in question are patently and obviously unequal. In fact, by their very nature they authorize parking for some while denying it to others, thereby creating a special privileged class of individuals and/or vehicles.

While Appellants recognize that not all classifications are violative of equal protection, and are valid if "the classification is reasonable and rests upon some ground of difference having a fair and substantial relationship to the object of the legislation " (Defendants Memorandum of Law, Appendix, pg. 79 ) we are in firm disagreement with Defendants'-Appellees' contention that there exists here a rational relationship between the classes drawn and the public purpose to be attained. The rationale for the restrictions in question regarding governmental employees were set forth in the affidavit of Theodore Karaghezoff, the Commissioner of the Department of Traffic:

"...there are employees of the City, State and Federal governments who use government and privately owned vehicles and travel throughout the City and the surrounding areas. In the course of their working day, these government employees must regularly conduct business in their offices or other government buildings for short periods of time on a transient basis. Very often, these government buildings are located in highly congested sections of the City and, as a result, the government employees find it difficult, if not impossible, to obtain parking reasonably close to the government building." (Appendix at pg. 48)

and reiterated and summarized in Defendants'-Appellees' Memorandum of Law:

"These authorizations to park are sparingly granted to governmental employees who, in the course of their daily duties, must travel extensively to and from their base of operations. Their efforts on behalf of the public at large are best expended in performing their governmental functions and not in cruising around in search of a place to park. The latter



pursuit would result in inefficient waste of  
their time and the taxpayer's dollars."  
(Appendix at pg. 78)

Appellants must take issue with the factual accuracy of these statements. Even a cursory examination of the areas in question would make it obvious that this is not the rationale employed by the Department of Traffic. In fact, the spaces are allotted to individuals and agencies who do not "travel extensively" but merely travel to government buildings, where they work all day, and use their vehicles only to return home at the end of the day. Examples of these abound, and include District Attorneys, Department of Probation personnell, Board of Education employees, etc.<sup>2</sup>

[The Appellants do not concede that the rationale given by Defendants-Appellees is sufficient to satisfy constitutional requirements. In fact, we feel that because it is so obviously contrary to the actual state of facts, the Court below committed reversible error in not allowing a hearing to resolve the factual controversy.

The questions existing as to whether or not Defendants-Appellees in fact have created standards to follow, and whether or not constitutional requirements for such standards are met, should have been determined at a hearing. The Court instead accepted the word of Defendants-Appellees, without ever allowing Plaintiffs-Appellants their day in court. We respectfully submit that this was something the Court was not in a position to do.

<sup>2</sup> An official of the Department of Traffic, citing this example in a telephone conversation with an associate of the office of Appellants' attorneys, stated that these parking spots were for teachers, as an inducement to work at certain schools.

It is then, highly questionable, how these restrictions "result in benefits which inure to the general public" (Appendix at pg. 50, Karagheuzoff Affidavit). They permit certain governmental employees the opportunity to drive their cars to work without paying for garages, and increasing congestion of traffic into and out of the city at peak rush hours, when the traffic problem is most severe.

A recent case, Friends of the Earth v. Carey, (Docket No. 74-4500, KTD)( U.S. District Court, E.D.N.Y. ) which involved environmental protection, held that environmental considerations are such that New York City must implement the environmental plans involved. This means -- an imposition of tolls on various bridges located in New York City, in addition to other traffic restrictions, including a reduction in vehicular traffic in midtown and downtown Manhattan, a reduction in illegal parking by increasing tow aways, and a reduction in taxi cruising in the Midtown area -- all so that pollution may be cut down.

In view of this decision, it is at the very least questionable whether the type of parking being disputed in the case at bar, even were it proper, should be allowed to continue. And, if as the Plaintiffs-Appellants contend, the parking is being promulgated as a result of political fiat, and, in fact, is illegal, there is no question that it should not be allowed to continue. And if the "object sought to be attained" (Nebia v. New York, supra., at 525) by these regulations is the saving taxpayer dollars, it is clear that



the means selected bear no relationship to that goal and is therefore, violative of the due process clause of the Fourteenth Amendment.

In light of the extensive procedure allegedly employed by the Department of Traffic and outlined by Mr. Karagheuzoff in his affidavit (Appendix at pgs. 48-52 ) to insure compliance with their alleged rationale it is difficult, if not impossible, to believe that the failure of these traffic restrictions to reflect the stated policy, is unknown to the Defendants-Appellees in this action.

While the Defendants-Appellees, in paragraph 32 of the Karagheuzoff affidavit ( Appendix at pg. 52) attempt a scapegoat provision by transferring the responsibility for compliance to individual administrators once an area has been set aside for a given agency, that paragraph is devoid of any provision for rules and sanctions regarding the privilege so conveyed, or any other effort to insure application (or even inform!) of the "stated rationale". We are not dealing here with a question of abuse by employees or special groups of special parking privileges as the Court below stated (Appendix at p. 1 - Docket sheet Eastern District Court). To the contrary, we are dealing with an open and flagrant abuse of the constitution in that there is an improper delegation of powers and a lack of standards to be followed, in the case at bar. (Point 3 of this Brief discusses the "delegation" issue fully). It is further submitted, that separate and apart from the absence of guidelines and sanctions, there are enough examples of regulations which are patently not in conformity with the stated rationale, as to question its very existence as a governing principle. And note, that it is not even sufficient, if the regulation is, on its face, reasonable, if

it does not "operate" with substantial equality and uniformity, People v. Greeman, supra., Farrell v. City of Syracuse, supra.

In Zenith-Godley, Inc., et al. v. Wylie et al., 108 N.Y.S. 2d 681 (Supreme Court, New York County 1951) referring to a New York City Traffic Regulation,

"The Court recognizes that in a large city as this it is essential that regulations be promulgated for the proper conduct of vehicular traffic and that regulations of a stringent nature are here required whereas they are not in smaller municipalities and that to the traffic authority must be vested a wide discretion in the promulgation of traffic regulations. Nonetheless, the discretion exercised must be in conformity with law.

While the traffic commissioner possesses power under the authority of Section 1063 of the City Charter to promulgate regulations, they must be reasonable; this is well established law. If they are unreasonable, arbitrary and unjustly discriminatory, they are invalid and will be so adjudged when assailed." 108 N.Y.S. 2d at 687 (Emphasis added)

In the above case, the court carefully examined the rationale behind a traffic ordinance that prohibited vehicles of a certain length from certain areas of the city and found that the facts did not support the reasoning behind this regulation, and was therefore unjustly discriminatory. In light of the congestion of traffic and narrowness of streets in the restricted area in Zenith - Godley, supra., the regulations were not even arbitrary on their face, as they are in the instant case.

Even assuming arguendo, that the stated rationale for these regulations was factually accurate, there still would be a violation of equal protection and the due process. If the restricted areas were, in fact, designed for the use of government employees who must travel extensively and



park for only short intervals, there has been no allegation by the Defendants-Appellees that these employees require the use of an automobile for performance of their duties. Trucks or other specialized vehicles comprise a minute percentage of the vehicles parking in these zones, and there is no such limiting prerequisite, according to Karagheuzoff's affidavit. New York City has an extensive public transportation system, and it is a well known fact, it is far more efficient than private transportation for travel within the city limits, during the working day. In the overwhelming majority of cases, the type of government employees who receive these parking privileges are not required by their duties to leave the city limits while on the job. There is, therefore, no constitutionally valid reason why they should not use public transportation while on the job. If they wish to use cars to commute from homes outside the city, that of course, is their prerogative. In any event, it is clear that the rationale has no relevance to benefitting the public of the saving of taxpayer dollars.

In effect, these regulations create a special privileged (for parking purposes) class of certain public servants. As Judge Wilder articulated in City of Rochester v. Lindner, 167 Misc. 790, 4 N.Y.S. 2d 4, (City Court, 1938):

"It may be that, as applied to an official act in an emergency or other matter of vital importance to the public, "the king can do no wrong". Even so, the public servant is not a prince of the royal blood, Official necessity is not to be mistaken for personal privilege, nor authority for impeccability." 167 Misc. at 794, 4 N.Y.S. 2d at 7.

This was quoted in another case, City of Rochester v. Tuffy, 169 Misc. 358, 6 N.Y.S. 2d 975 (City Court 1938) involving a probation officer. While these cases involved public servants who violated existing ordinances, in the absence of "compelling necessity," a regulation which has the same effect, cloaking such conduct in the guise of legality, is an even more reprehensible situation, with the regulation itself being in violation of law rather than the public servant.

A separate, but equally deficient, rationale is given by Defendants-Appellees with regard to the special privileges accorded to diplomats by the Department of Traffic. While counsel for the Appellees clearly recognizes the need to justify this classification on a "public good" basis, his argument is weak. While diplomatic immunity from criminal process may interfere with enforcement of parking regulations by the Parking Violations Bureau, their immunity does not prevent the towing of vehicles illegally parked. The threat of the inconvenience and expense of towing, would present an ample deterrent to illegal parking by diplomats which interferes with traffic flow.

In the discussion of equal protection in their Memorandum of Law (Appendix pg. 77), Defendants-Appellees drew the distinction between classifications which are patently rationale and those that are not. The Memorandum went on to characterize the classification involved here, as "patently rational", and therefore, "insubstantial and therefore, not properly in the Federal District Court." (Appendix, pg. 77)

With this characterization, we must take exception. There is nothing "patently rational" about regulations which permit certain governmental employees to park vehicles in certain areas while barring all other vehicles. It is for this reason, that an extensive, and factually



accurate, explanation by the Traffic Commissioner is required to shed light upon the Defendants'-Appellees' rationale for these restrictions.

Furthermore, none of the cases cited by Defendants-Appellees (in their Memorandum of Law) on this point are even factually similar. These cases related to the question of jurisdiction of the Federal Courts when a case is "wholly insubstantial" due either to previous decisions or an obvious lack of merit. City of New York v. Richardson, 473 F. 2d 923 (2nd Civil 1973), Green v. Board of Elections of New York City, 380 F. 2d 445 (2nd Civil 1967), Hagans v. Lavine, 415 U.S. 528 (1974). In the Hagans case, the court adopted a previous definition of "insubstantial":

[c]laims. . .are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281. A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." (415 U.S. at 537)

and ruled that the complaint did confer jurisdiction. In their Memorandum of Law, Defendants-Appellees failed to cite a single case where the issues now before this Court were ever litigated as to even raise the question of "insubstantiality".

The Defendants-Appellees Memorandum of Law (Appendix at pgs. 79-80) also pointed out that if the classification is based on inherently suspect criteria or infringes on a fundamental right, a more rigid test is applied to justify the classification than if neither of those two factors are present. Plaintiffs-Appellants are in agreement with this statement of law but would not discount its applicability to the present case. It

is submitted that a classification excluding all but certain governmental employees and diplomats is "inherently suspect" and furthermore, the right of the public to benefit from public property is a "fundamental right."

Assuming arguendo, that neither of the two factors are present to require application of the more stringent "compelling interest" test, and that, in fact, the appropriate test in this case is the "rational relationship standard"<sup>3</sup> there still exists here a violation of Plaintiffs-Appellants equal protection rights, as has been demonstrated by the earlier discussion of the equal protection issue in Plaintiffs Brief (this point) which applied less stringent "rational relationship" standard.

<sup>3</sup>A rational relationship must exist between the classes as exist between the classes as established and the goal sought to be achieved by the classification. Railway Express Agency v. New York, supra.



POINT III

THE DELEGATION OF POWER IN THE INSTANT  
CASE IS IMPROPER AND INVALID  
AND THE REGULATIONS IN QUESTION ARE  
- VIOLATIVE OF PROCEDURAL DUE PROCESS

Section 1642 of the New York State Vehicle and Traffic Law and Sections 2102 & 2103 of the New York City Administrative Code are invalid, illegal and unconstitutional. The State of New York may not delegate legislative authority to a political subdivision of the State without delineating sufficient guidelines and the City of New York may not delegate legislative authority to subordinate agencies without prescribing adequate standards.

Section One of Article three of the New York State Constitution states:

"The legislative power of this state shall be vested in the Senate and Assembly."

It is well settled that the Senate and Assembly may delegate to subordinate administrative agencies the power to execute and administer its laws.

The State legislature may not, however, abdicate its legislative function.

People v. Weingrad, 26 N.Y.S. 2d 841 (Cty. Ct. of the City of New York, 1941).

Section 1642 of the New York State Vehicle and Traffic Law delegated authority to "the legislative body of any city having a population in excess of one million" to enact parking regulations. In delegating this particular authority, the state has not prescribed any guidelines.

"There is no question raised here as to the fact that legislative power may be delegated to a political subdivision of the State. City of Rochester v. Simpson, 134 N.Y. 414, 31 N.E. 871. The delegation, however, must be within certain

reasonable limitations. There must be standards to guide the holders of the delegated power and to reasonably apprise them of the intent of the Legislature in enacting the law to be applied. (City of Utica v. Water Pollution Control Board, 4 N.Y.2d 164, 182, N.Y.S. 2d 584) In the absence of standards sufficient to indicate the breadth of the legislative intent, delegative legislation is void. Packer Collegiate Institute v. University of State of New York, 298 N.Y. 184, 81 N.E. 2d 80; Small v. Moss, 279 N.Y. 288, 18 N.E. 2d 281 (1938) "The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field."

Gulest Associates, Inc. v. Town of Newburgh, 24 Misc. 2d 1004, 204 N.Y.S. 2d 729 (Sup. Ct., Orange County, 1960); overruled on other grounds. Jenad, Inc. v. Village of Scarsdale, 18 N.Y. 2d 78, 271 N.Y.S. 2d 955 (1966). See also, Small v. Moss, 279 N.Y. 288, 18 N.E. 2d 281 (1938).

The New York City Council enacted Sections 2100, 2102 and 2103 of the New York City Administrative Code pursuant to the authority allegedly delegated by New York State under Section 1642 of the Vehicle and Traffic Law. The Transportation Administration was created by Section 2100 of the New York City Administrative Code and vested under Section 2103 with the duty to make rules and regulations with respect to parking. Section 2102 of the Administrative code permits the Transportation Administration to delegate the power to make rules and regulations with respect to parking.

As stated in Defendant's-Appellee's Memorandum of Law (Appendix at pg. 63 ):

"The right of local legislatures to delegate power springs from the same reasons and is controlled in the same way as delegation of power by the State Legislature."

A local government cannot validly delegate legislative power to an administrative body without prescribing standards or rules to guide the agency in the exercise



of its discretion. Novak v. Town of Poughkeepsie, 57 Misc. 2d 927, 293 N.Y.S. 2d 780 (Sup. Ct., Dutchess County 1968). The City, like the State, must be careful not to abdicate its legislative function.

There is a narrow but vital line separating an agency's mere administrative action of effectuating a legislative policy declared in a statute or ordinance and exercising such breadth of authority that the administrative agency is essentially functioning as a legislative rather than an administrative body. Panama Refining Company v. Ryan, 293 U.S. 388, 418 (1934). It is thus clear that the City Council must circumscribe any subordinate agency's discretion by delineating an intelligible principle or policy to guide it in exercising its delegated authority. Panama Refining Company v. Ryan, *supra*.

The City Council establishes its principles and policies by setting standards. It is a "well established principle of administrative law that to prevent an unlawful delegation of power, it is incumbent upon the legislative authority to set forth standards to indicate to the agency the limits of its power - the specificity of standards being relative to the nature of the program". Matter of Sullivan Co. Harness Racing Assoc. v. Glasser, 30 N.Y. 2d 269, 276, 332 N.Y.S. 2d 622, 626 (1962). The delegation of discretion to a subordinate body must thus be circumscribed by sufficient standards to adequately guide the agency in the exercise of the power conferred upon it. People v. Weingrad, *supra*., 1 Am. Jur. 2d 116, State v. Imperatore, 223 A.2d 498 (N.J. Super., 1966)

Defendants-Appellees stated in their Memorandum (Appendix at page 58):

"In actuality the Section (2103 of the Administrative Code) does not delegate authority to make laws but does delegate the power to make rules and regulations."

It is clear from a reading of the applicable ordinances that the only standard delineated is "to make such rules. . .as may be necessary." (2103 New York Administrative Code). This standard is so vague and nebulous that it gives the Transportation Administration vast discretionary decision-making power. The Transportation Administration thus functions as a legislative (or law-making) body rather than an administrative (or rule-making) agency.

The Defendants-Appellees further argue that "as may be necessary" is a sufficient standard here. While the general rules with respect to standards are well settled,

"their applicability probably never will be. As the cases cited disclose, the ever recurring problem is whether any statute constitutes an unlawful delegation of legislative power or merely a discretionary power to administer and execute the declared policy of the legislature within reasonably clear standards fixed by statute. No case may be dogmatically followed." Thomas v. Board of Standards and Appeals of City of New York, 33 N.Y.S. 2d 219, 226, 263 A.D. 342 (2nd Dept., 1942).

Thus each case and each standard must be separately studied. It is our contention that in this particular case the standard "as is necessary" was clearly insufficient to adequately circumscribe the Transportation Authority's discretion in promulgating parking regulations.

To determine the specificity of standards required in a particular statute or ordinance, a balancing test may be used. The fear of arbitrary and discriminatory agency action must be weighed against the need for responsive and responsible agency action. State v. Imperatore, supra., The standard must thus be as specific as possible without limiting agency action to such an extent that it fails to be useful. Judicial approval of "'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. . .



It (the legislature) therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules." American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946). Thus the city need not deal with the multitudinous details of each particular problem. Broad discretion may be delegated when it is difficult to lay down more specific standards or comprehensive rules.

Parking regulations is a broad term including alternate side of the street parking, metered parking, time restricted parking, day restricted parking, etc. In the instant case we are dealing not with those typical parking regulations but with the selecting and assigning of authorized parking areas within the city. This aspect of parking is particularly sensitive because it involves the expropriation of public property for use by designated classes of individuals. It may be that such power was never delegated by the legislature. In any event, the danger of arbitrary and discriminatory action is particularly present in this situation.\* This is especially true when the expropriation is on a massive scale.

Therefore, the city must prescribe more specific policies and standards when a regulation has the effect of expropriating public property then merely the "as is necessary" provisio set out in Section 2103. Authorized parking is not a complex, technical or rapidly changing problem. One need not look past the affidavit of Theodore Karagheuzoff, Commissioner of Traffic of the City of New York (in support of the Defendants Memorandum of Law in the District Court), to make this impeccably clear. Mr. Karagheuzoff states that, in order to determine whether the need exists in a particular instance for the designation of an area limited to authorized parking, the Department of Traffic determines 1) that individual members of the governmental agency or group must, on a regular basis, use a vehicle in

\*the authorized parking situation.

the normal course of their business, 2) that these individuals are required to regularly conduct their business for short periods of time, 3) in buildings located in congested portions of the city, 4) and then drive to other portions of the City and surrounding areas. If the Department of Traffic could formulate these general policies and standards to guide them, it is clear that the legislature and city also could have done so.

The Department of Traffic does not actually follow its own rationale for selecting and assigning areas for authorized parking. (see Point II of this Brief) Even if they did, however, in selecting their own standards and policies for designating these special parking areas, the Department of Traffic is, in effect, creating a privileged class of citizens:

"Broad policy-making exclusions of an entire class are legislative enactments and not mere administrative acts of an officer or agency. . ." Calzaretta v. Mulrain, 132 N.Y.S. 2d 704, 706 (Sup. Ct. N.Y. Cty. 1054)

More precision is required from regulations which create privileged classifications. Snell v. Wyman, 281 F.Supp. 853, 869 (S.D.N.Y. 1968)(dissenting opinion). Legislation should be reasonably related to the public interest and should effect its purpose with the least possible abrasive effect on personal rights. Factors to be considered in appraising legislation are, 1) the seriousness of the interest involved, 2) the inelegance of the scheme and 3) the ease of correcting it by more discriminatory methods. Snell v. Wyman, supra., at 869 70. While parking may not be the most important of personal interests, the legislature could so easily have set forth more specific standards that there was no excuse for not doing so.

Defendants-Appellees cited cases in their Memorandum (see appendix) in which broad standards were considered adequate by the courts. These cases may be distinguished from the present matter, however, because each posed



special problems which necessitated broader standards than would otherwise be necessary, desirable or acceptable. For example, in Zemel v. Rusk, 381 U.S. 1, 17 (1965) the court spoke of "the changeable and explosive nature of contemporary international relations," in State v. Imperatore, supra., the court mentioned "special conditions by their nature emergent and transient" in American Power & Light Co. v. SEC, supra., at 104 of "unduly complicated corporate structures" and of "the necessities of complex economic and social problems," and in FCC v. RCA Communications Inc., 346 U.S. 86, 90 (1952) "as concrete as the complicated factors for judgment in such a field of delegated authority permit."

As already mentioned, parking is not so complex or rapidly changing that it would be difficult for the legislature or city to prescribe adequate standards to circumscribe agency discretion. The breadth of authority delegated by the legislature and city council in the present case enables the Department of Traffic to use its allegedly delegated authority as a guise to justify the enactment of parking regulations which support specified classes of individuals.

There are a series of other problems with the city council's delegation of authority to promulgate parking regulations.

First, and foremost, there are problems with the manner in which the Transportation Administration subdelegated its authority to designate authorized parking areas. The Transportation Administration delegated its alleged power to approve an area for authorized parking to the Department of Traffic. The Department of Traffic approves an area for authorized parking and then delegates authority to individual administrators to grant authorizations to specific individuals to park there. Mr. Karagheuzoff stated in his affidavit (in support of Defendants-Appellees Memorandum of Law in the District

Court) that the Department of Traffic follows a specific rationale in determining what areas should be designated for authorized parking and in determining who would be assigned such parking spaces.

The Department of Traffic does not, however, follow its own rationale and does not even inform the individual administrators of the "stated rationale" to guide them when they actually grant authorizations to specific individuals. The Department also does not provide sanctions for violating the "stated rationale" and in no way restricts the individual administrators from granting authorizations to any individual. The legislature and City Council, to prevent pure delegation of legislative authority, must prescribe certain procedures and rules of decision. To enable an individual to act without making any finding of fact is to make any conditions and policies inoperative and to invest the individual with uncontrolled legislative power. Procedural due process requires that no person designate preferential parking spaces unless it is within his delegated authority to do so. If this authority depends upon the finding of specific facts (as Mr. Karagheuzoff alleged it did in the instant case) substantial compliance must be shown.

Secondly, as mentioned previously, the Department of Traffic has further delegated the power to regulate parking by giving to persons in other governmental agencies the authority to determine who is "authorized" to park in areas approved by the Department of Traffic for authorized parking. "It is too well settled to require citation that an administrative agency may not delegate its quasi-judicial and discretionary function to persons who are neither officials nor employees of the agency or of the governmental body of which the agency is an arm." New York Evening Inquirer,



Inc. v. Kennedy, 162 N.Y.S. 2d 530, 532 (Sup. Ct. N.Y. Cty. 1957) 18 Misc. 2d 950, N.Y. Jur. Admin. Law §83. An administrative Board may not delegate its quasi-judicial and discretionary functions to subordinates. Weinberg v. Town of Clarkstown, 78 Misc. 2d 464, 357 N.Y.S. 2d 332 (Sup. Ct. Rockland County, 1973).

It is clear also that there has been not one, but rather a series of subdelegations in the instant case. It is imperative that standards and policies be clear and precise when so many redelegations of authority are involved. With each redelegation, the decision-making body is further removed from the direct control of the legislature (the elected representatives of the public).

Third, the same agency that prescribes the rules and regulations, sets the fines and conducts all investigations and hearings. The City council delegated to the Transportation Administration the function of making parking regulations. Pursuant to §2102 of the Charter the Transportation Administrator vested these powers with the Traffic Department. The Parking Violations Bureau was created within the Department of Traffic to accept pleas and to hear and determine charges of parking violations and to levy and collect fines for parking violations. In Cohen v. State University of Agr. and A. Sciences, 256 F.Supp 954, (N.D. Miss., 1966), (on which Defendants-Appellees relied in their Memorandum of Law, Appendix at pg 71) the court upheld the State University's authority to promulgate parking regulations. The Court pointed out, however, that the University regulations did not prescribe any form of University sanctions or University administrative procedure for the enforcement of fines or other penalties. Rather, the sole sanction was a charge brought in Justice of the Peace Court. The offender then had the

full right to challenge the validity of the regulation and to contest it on the basis of vagueness, indefiniteness or any other grounds. In the present case the Appellants only have resort to the Parking Violations Bureau, a subsidiary of the agency which formulated the parking regulations; clearly not an impartial and unbiased forum.

Defendants-Appellees, in their Memorandum of Law in the District Court, cited a series of licensing cases to demonstrate that broad standards are acceptable. These cases are entirely inapplicable to the case at bar, however, as they involve licensing statutes. Licensing statutes have been held to require less specific guidelines and standards than other statutes delegating authority to administrative agencies. Matter of Barton Trucking Co. v. O'Connell, 7 N.Y. 2d, 299, 197 N.Y.S. 2d 138, 143 (1959).

Even if the standard in this case were adequate, the Department of Traffic has acted improperly. Clearly, the Department has not even exercised its discretion within the vaguish, penumbral bounds expressed by the standard "as is necessary."

"'Necessary' is a less elastic and narrower term than 'reasonable'" Kings County Lighting Co. v. Maltbie, 244 A.D. 475, 280 N.Y.S. 560, 565 (3rd Dept. 1935).

As was discussed more fully in Point II, the Department of Traffic has not even sustained its burden of proving that its actions were reasonably related to the public good.

The regulations promulgated by the Department of Traffic had to have a rational basis and be for the public good (see Point II of this Brief).

"The test of legality is always the public good" Rudack v. Valentine, 163



Misc. 326, 295, N.Y.S. 976, 980 (Sup. Ct.  
N.Y. Cty. 1937)

It is necessary for the Department to establish that the parking regulations offer a reasonable expectation of some beneficial effect measured by the public interest. FCC v. RCA Communications, Inc., supra. As more clearly delineated in Point II of this Brief, the Department of Traffic has failed to show this. Instead the Department of Traffic has expropriated public property for use by special groups with consequent detriment to the public.

POINT IV (1)

THE COURT SHOULD NOT DECLINE  
TO EXERCISE JURISDICTION

Abstention from the exercise of federal jurisdiction is the exception, not the rule.

"The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959)

"[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." Alabama Public Service Comm'n. v. Southern R. Co., 341 U.S. 341, 361 (1951) (Frankfurter, concurring)

While the issue of improper delegation of state legislative authority is a question of state and not federal law, the Federal Courts have the power to hear pendant state claims that "derive from a common nucleus of operative fact." This has been interpreted to mean that claims that would ordinarily be expected to be tried in a single proceeding may be tried together even if one of the claims is based solely on state law. United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 86 S.Ct. 1130 16 L.Ed. 2d 218 (1966). In Siler v. Louisville and Nashville RR Co., 20 S.Ct. 451, 213 U.S. 175, 53 L.Ed. 753 (1909) the court stated:



"The federal questions as to the invalidity of a state statute because, as alleged, it was in violation of the Federal Constitution gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all questions in the case, even though it decided federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

In fact, in the Siler case, the Federal Court declared invalid the state regulation involved solely on state grounds.

In the instant case the court clearly has the power to decide the delegation of authority issue. The Federal Court has jurisdiction to hear the claims involved in Freidman v. Beame arising under the Federal Civil Rights Act and the U.S. Constitution. The issues of fact essential in resolving those claims are identical to the facts necessary to resolve the delegation issue. It is thus clear that in the interest of justice and expediency, the delegation issue should be heard in conjunction with this federal case.

The Defendants-Appellees argued (in their Memorandum of Law in the District Court, Appendix pg. 87) that the "Pullman Doctrine", articulated in Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941) should be applied here and that the court should decline jurisdiction until the state delegation issue has been resolved. The "Pullman Doctrine" is, however, inapplicable to the case at bar.

"In general, the three essential conditions for invocation of the doctrine of abstention are that the state statute be unclear or the issue of state law be uncertain, Harman v. Forssenuis, supra., 380 U.S. at 534, 84 S.Ct. 1177, that resolution of the federal issue depend upon the interpretation to be given to the state law, Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967), and that the state law be susceptible of an interpretation that would avoid or modify the federal constitutional issue." McRedmond v. Wilson

533 F.2d 757, 761 (1967). In the instant case none of these conditions are present.

First, Federal Courts have often abstained in cases where the state law involved in the controversy is unclear and unsettled. "On the other hand, where a state statute is unambiguous the Court must perform its adjudicative duty and has no right to abstain merely because a state court decision might render a federal adjudication unnecessary." McRedmond v. Wilson, 533 F.2d 757, 761 (1976). In this case the statute and ordinances are perfectly clear. There is no problem of interpretation. The delegation of authority issue has often been litigated in New York State courts as indicated by the numerous cases cited in Defendant's- Appellee's Memorandum (see Appendix, pgs. 58 - 64). The State Courts have thus had occasion to delineate the factors and conditions which are to be utilized in determining a state delegation issue.

Second, this case does not involve an issue "of state law the resolution of which (third) may eliminate or materially alter a federal question." Procunier v. Martinez, 416 U.S. 396, 94 Sup. Ct. 1800, 40 L.Ed. 224 (1974). Resolution of the federal issue is completely independent legally (not factually) from resolution of the delegation issue. The application of the statute and ordinances does not require intricate or penetrating statutory interpretation best left to the state before the federal questions can be decided. On the contrary, regardless of whether or not there is an improper delegation of authority, the Federal Civil Rights Act and constitutional questions remain exactly the same. Furthermore, the main thrust of this case is the expropriation of public property and the creation of special interest groups not the improper delegation of authority.

"Additionally, abstention would be improper since it is not appropriate to refer to a litigant in a §1983 Civil Rights suit to a state



forum for adjudication of his federal rights except in the most extraordinary circumstances." Jennings v. Patterson, 460 F.2d 1021, 1022 (1972).

To summarize, the instant case did not involve any of the three essential conditions for invocation of the doctrine of abstention. The case also involves the Federal Civil Rights Act and courts are hesitant to refer these cases to state courts. In Pullman, supra., the court decided to abstain from exercising jurisdiction to avoid a tentative decision by the Federal Court on state law claims which might be overturned by an authoritative state adjudication. This situation is clearly distinguishable from the instant matter. The state law involved here is not unclear or unsettled and an unequivocal state determination on the delegation issue would not modify or alter a Federal Court decision based on the Federal Civil Rights Act or constitutional issues. The state courts are clearly not the final expositors on issues of federal civil rights, equal protection and due process.

The Federal Courts should therefore exercise jurisdiction over the federal issues and exercise pendant jurisdiction over the delegation issue. "We must remain aware of the delays and expenses inherent in the abstention process and the fact that federal rights may be lost in the absence of expeditious federal adjudication". Coll v. Hyland, (U.S.D.C., N.J.) 411 F.Supp. 905, 908 (1976).

County of Allegheny v. Frank Mashudo Co., supra., which was cited by Defendants-Appellees (Memorandum of Law, Appendix, pg. 87) in support of their position, actually held that the District Court acted properly in adjudicating the claim and reiterated the principle that only exceptional

circumstances will justify abstention. This requirement has not been shown by Defendants-Appellees in the present case.

In the next case, cited by Defendants-Appellees (Memorandum of Law, Appendix, pg. 87), Burford v. Sun Oil Co., 319 U.S. 314 (1943), the court did hold that the District Court should have dismissed a suit seeking review of the reasonableness under Texas state law of a state commission's permit to drill oil wells. That case, however, is clearly distinguishable from the case at bar. The court relied on the fact the Federal Court could "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest." 319 U.S. at 318 (emphasis added). As was discussed fully under Point II of this Brief, this suit is brought to correct a situation that is prejudicial to the public interest and, in any event, no public interest would be prejudiced if Plaintiffs-Appellants legal rights were enforced.

Significantly, it should be noted that Burford, involving an order which was part of a regulatory system devised for conservation of oil and gas in Texas, dealt with "non-legal (geological) complexities", where the State had established its own elaborate review system. "The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts." (319 U.S. at 333, 4). This case, unlike the case at bar, clearly fits within the 2nd category of cases outlined in Colorado River Water Conservation District, et al., v. U.S. (cited in Defendants-Appellees Memorandum, Appendix at p. 87) where abstention is appropriate be-



cause there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. . ." (emphasis added, 96 S.Ct., at 1235)

In conclusion Burford dealt with the enforcement of state rights created by state legislation and affecting state policies and the majority (there was strong dissent by Justice Frankfurter) seems to have found Federal intervention abhorrent in that situation.

While Defendants-Appellees (Memorandum of Law, Appendix pg. 88) cited Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) to imply that the local nature of traffic regulation dictates application of the doctrine of abstention that court did entertain jurisdiction in a case involving traffic regulations.

POINT IV (2)

THE COURT SHOULD NOT DECLINE TO EXERCISE  
JURISDICTION UNDER THE YOUNGER DOCTRINE  
AND PLAINTIFFS APPLICATION FOR A  
PRELIMINARY INJUNCTION SHOULD BE GRANTED

(See also Plaintiffs-Appellants "Memorandum of Law in support of Plaintiffs motion for injunctive relief", Appendix at pgs. 11 to 14.)

The Defendants-Appellees also sought to rely (Point II (3), Appendix, pgs. 89-90) on the Younger doctrine for their position. At the outset it should be noted that in this case (Younger v. Harris, 407 U.S. 37 (1971)) injunctive relief is only an ancillary part of the entire cause of action. The Younger doctrine, pertaining as it does only to the staying of state court proceedings, therefore, would not be dispositive of the issue of abstention even were it applicable to the case at bar. In addition, for the reasons set forth below, it is submitted that the Younger doctrine has no application to the present case.

In Younger appellee had been indicted for violation of a State criminal statute and sued in the Federal District Court to enjoin the appellants, the County District Attorney from prosecuting him, contending that the act was unconstitutional on its face and inhibited him from exercising his free speech right. In holding that the Federal Court should not enjoin a criminal proceeding in a state court a general rule was laid down and exceptions were referred to in the decision. Obviously this case is distinguishable from the case at bar, in that here no proceedings have begun in the state court and there is no action pending in the state court which would result in "duplication of legal proceedings" (401 U.S. at 44). The Defendants-Appellees argue that the Younger doctrine has been extended beyond court proceedings, citing (Memorandum of Law, Appendix p. 90) Geiger v. Jenkins



401 U.S. 985 (1971, (aff'd), 316 F.Supp. 370 (D.C.N.D. Gra.) and McCune v. Frank, 521 F.2d 1152 (2nd Civ. 1975).

As the majority opinion in Younger makes clear, the Court bases its decision on policy grounds, not reaching any questions concerning the force or affect of the Federal Antiinjunction Statute, 28 U.S.C. Sec 2283:

"Because our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention, we have no occasion to consider whether 28 U.S.C. §2283, which prohibits an injunction against state court proceedings "except as expressly authorized by Act of Congress" would in and of itself be controlling under the circumstances of this case." 401 U.S. at 54.

On the contrary, the courts, decision in Geiger was based entirely on the anti-injunction statute. That statute reads as follows:

"A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to protect or effecutate its judgments." 28 U.S.C. §2283

As Justice Douglas pointed out in Younger, Section 1983 should be included in "expressly authorized" exception to section 2283:

"There is no more good reason for allowing a general statute dealing with federalism passed at the end of the 18th Century to control another statute also dealing with federalism, passed almost eighty years later, than to conclude that the early concepts of federalism were not changed by the Civil War." 401 U.S. at 62

The Geiger court ruled, however, that the Plaintiff has "alleged nothing which would entitle him to relief under the Civil Rights Act." (316 F.Supp. 374). Thus, the "expressly authorized" exception through the anti-injunction statute had no application in the Geiger case. Thus, it cannot be said that

Geiger is an extension of Younger when, in fact, the court in the latter case did not decide "whether an injunction to stay proceedings in a state court is 'expressly authorized' by §1 of the Civil Rights Act of 1871, now 42 U.S.C. §1983." 401 U.S. at 55. It is therefore also submitted that the case of Geiger v. Jenkins, supra., is not controlling on the case at bar in light of the fact that there exists here valid constitutional claims. In addition, the present case also fits with the other exceptions recited in the anti-injunction statute. Certainly, if the court were to decide that the regulations here in question are unconstitutional, the several forms of injunctive relief requested would be "necessary in aid of" the court's jurisdiction, and "to protect or effectuate its judgments." 28 U.S.C. 2283.

In McCune v. Frank, supra., the other case cited by the Defendants-Appellees for the proposition that the Younger doctrine has been extended beyond court proceedings, the court specifically refrained from passing on the applicability of Younger. 521 F.2d at 1158. The court held only that District Court had reached a constitutional issue prematurely and remanded the case for further proceedings. Unlike the case at bar, there was, in McCune a state court ruling on the same constitutional question in a related case and there was a question as to the res judicata effect of the prior judgment raising the possibility of an obvious and direct conflict between the Federal and State Courts. In addition, the McCune court held that the Younger doctrine was "no bar to an action seeking to enjoin a proceeding claimed to be constitutionally defective" 421 F.2d at 1158, and indicated that the claim of bias of the state proceeding (which in that case had been set aside by the parties as an issue not to be litigated) would have been sufficient to take the case out of the ambit of Younger.



In the case at bar, the overwhelming majority of the designated parking areas which are the subject of this lawsuit, are given to state and municipal employees, including state court personnell. Therefore, the State Courts in New York City have a vested interest in maintaining the status quo and the benefits inherent thereto. Also, the Federal Courts would be better suited to decide this case, being far more insulated from the pressure of city officials who have the same vested interests and obvious additional interests in denial of Plaintiff's-Appellant's causes of actions.

Even assuming arguendo that the Younger doctrine has been extended as asserted by the Defendants-Appellees, a careful analysis of that case reveals that it is not a bar to the present action, for the following reasons:

FIRST: Citing Ex parte Young, 209 U.S. 123, Justice Black, delivering the decision of the court, admitted "that when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions." 401 U.S. at 45. The opinion continues to quote Ex parte Young for the principle that "the accused should first set up and rely upon his defense in the state court, even though this involves a challenge of the validity of some statutes, unless it plainly appears that this court would not afford adequate protection." For the reasons set forth above regarding the obvious bias of the state court in hearing the present law suit, it is submitted that this stated exception is applicable to the case at bar.

SECOND: As was noted above, the Younger court relied on the principle that in view of the fundamental policy against federal interference

with state criminal prosecutions, great and immediate, irreparable injury is required before a Federal Court can stay proceedings in a State Court. The opinion, however, goes on to define the injury required noting the "special legal sense" of the term "irreparable""

"the threat to the plaintiffs federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." 401 U.S. at 46.

Under this definition, the Plaintiffs'-Appellants' injury in the case at bar is clearly "irreparable". There is no procedure in the Parking Violations Bureau to litigate a constitutional issue. There is no judge, no stenographic record and no rules of evidence. Furthermore, regardless of the determination made in the individual case, the same plaintiff or any of the other plaintiffs could subsequently still receive another summons for violation of the same or similar type parking restriction. In addition, and perhaps most significantly, Appellants in the present case seek not only to stay the proceedings in the Parking Violations Bureau, pending the determination of the constitutional issues, they also seek to enjoin enforcement of the invalid restrictions. These restrictions have far more than the "chilling effect" present in the Younger decision. 401 U.S. at 50. Appellants in the case at bar, are prohibited from parking in certain areas and must either look elsewhere for parking or park in violation of law and be subject to fine. The effect is immediate and direct.

THIRD: As the Defendants-Appellees recognize (Memorandum of Law, Appendix p. 89) there is no problem of federal intervention in state proceedings when there is a showing of "bad faith". The parking restrictions



in question in this case are so patently and flagrantly discriminatory and unconstitutional, that one wonders how they could be promulgated in good faith. This is especially so in light of the affidavit submitted by Theodore Karagheuzoff, wherein he states the rationale for the regulations in question: "That these regulations permit government employees to park in and around public buildings because they "must regularly conduct business in their offices and other governmental buildings for short periods of time on a transient basis." (Appendix p. 48) When the Commissioner authorizes the allotment of parking for Assistant District Attorneys outside a courthouse, a man of his stature is presumed to know that Assistant District Attorneys are not traveling salesmen and their duties require their presence in the courtroom for the entire working day. This is only one of many examples, however, it does raise the issue of bad faith in no uncertain terms. In fact, as Justice Black (in Younger) recognized, Federal Courts can interfere with state prosecutions when the state criminal statute in question is "patently and flagrantly unconstitutional on its face," 401 U.S. 56. The majority opinion also recognized that there may be "extraordinary circumstances in which the necessary irreparable injury can be shown even the absence of the usual prerequisite, of bad faith and harrassment." 401 U.S. at 43. Relevant to this principle, and distinguishing the present case from all the cases cited by Defendants-Appellees in their Memorandum of Law with regard to the abstention doctrine, the parking restrictions in question here, are by no means simply a method of regulation of a valid state power. Instead, they involve the taking of public property from the general public in favor of certain privileged classes. With no instrumentality to question

the regulations or their fictitious rationale, so that the public streets may be returned to the public or the benefit of the public, "extraordinary circumstances" exist.

FOURTH: It should also be emphasized once again, that in regard to the declaratory relief requested here (that the restrictions in question are unconstitutional) and in the enjoining of their enforcement, no state proceeding is pending and therefore there really is no issue of federal intervention with a state proceeding.



CONCLUSION

For all of the foregoing reasons, the judgment dismissing Plaintiffs-Appellants' complaint should be vacated, and the case should be remanded for further proceedings not inconsistent with the opinion of the Court.

Respectfully submitted

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FRIEDMAN

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK  
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 2 day of May 1977 at No. Municipal Building, NYC

deponent served the within *Bruf*  
upon Hon. W. Bernard Richland, Corporation Counsel

the Appellee herein, by delivering true  
copies thereof to him personally. Deponent know the person so  
served to be the person mentioned and described in said papers as the  
Appellee therein.

Sworn to before me this  
2 day of May 1977

*William Bailey*  
WILLIAM BAILEY

Notary Public, State of New York

No. 43-0182945

Qualified in Richmond County

Commission Expires March 30, 1978

*Edward Bailey*  
Edward Bailey